

1892

Taxation of Corporations

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T A X A T I O N
OF
C O R P O R A T I O N S.

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A Thesis presented
for the degree

of

Bachelor of Law

by

Richard Farrell Kenefick,

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During the past half century the growth of corporations in the United States has been remarkably rapid. In the early days of our history, corporations were hardly known, and formed but a very unimportant factor in the commercial business of the country. But since that time to the present their growth has been steady and vigorous; and to day an immense amount of our trade is in the hands of corporations. These associations are engaged in all variety of pursuits, useful and otherwise, and are created for almost every purpose; for the advancement of education, morals and religion, the diffusion of literature, science and art; to the prosecution of plans of internal communication, for the purpose of establishing new industries, promoting new inventions, and extending the great interests of commerce and agriculture and manufactures. The limits of their power has not been determined by state boundaries for single corporations carry on business extending throughout the length and breadth of the land and into every state of the Union. But the states thought that if corporations passed through their territories they should pay for the privilege of doing so.

It is on account of these attempts on the part of the state to tax and restrict corporations created in other states that that great and important branch of law was evolved, which Waterman says, "ranks among the leading topics of the law," and Cook declares "is fast becoming a system of jurisprudence in itself. To determine those corporations which the state may, and those which they may not tax, upon what the tax may be levied; how far the power of the state is limited, whether the power to tax is in any case exclusive of the national government or whether the power of the state is not in some cases concurrent with, and in others entirely dependent upon the national government, and to learn the general power of the states in this regard, are questions which it would be of immense value to solve. But the solution is attended with great difficulty for the answer has in some instances not been definitely ascertained. The difficulty arises where the corporation is one engaged in interstate commerce; where the corporation is not of that kind that carries on a business merely local in its nature, the law is clearly settled. Such a corporation can only do business in another state than the one creating it, by the

comity of the state granting the privilege of doing business therein; subject to the laws of such state and to any conditions it may impose upon the privileged corporation; providing the conditions be not illegal nor in violation of any rights secured by the United States Constitution. Over such "foreign" corporations states have a general, absolute, and unlimited power of taxation. (In reference to the power of the states to tax "foreign" corporations, see Cook, Morawetz, Beach, on corporations, story on the Const., Miller on the Const., and Taylor and Waterman on corporations).

They may tax to such an extent as to drive the corporation from the state, and may impose a higher tax upon foreign corporations than upon corporations carrying on the same kind of business but chartered within the state imposing the tax. This discrimination is held not to be in conflict with the constitutional provision that, (that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states). (Art. 4, sec. 2 U.S. Const.) Because the long settled doctrine of the court has been that a corporation is not a citizen within the meaning of this provision. *Paul v Virginia*,

8 Wallace, 158; Pembina Co. v. Penn., 125 U.S. 181).

The reasoning upon which this opinion is based is that citizens are not denied those privileges and immunities guaranteed to all citizens, for the tax is not laid upon them nor upon the person of corporators or stockholders; that it is the artificial being, the mere legal entity that is taxed, and that the tax is paid out of its funds.

It does not seem consonant with reason to say that it is not the stockholders or corporators who are taxed and that when such discrimination is made, it is not made against the persons composing the corporation. While it may be doubted that the legislature or state imposing the tax did not take into consideration the persons composing the corporation; even though they may have considered the corporation as a legal entity entirely distinct from its members; yet the the practical effect of such a discriminating tax is that it imposes heavier burdens upon the the members of foreign corporations than upon the members of corporations created within the state imposing the tax; and thus discriminates between the citizens of the several states, contrary to the

constitutional provision above referred to. This injustice results from regarding the corporation as a legal person; as something distinct from its members. Distinct from its members in what way? Who organizes the corporations, who subscribes for the stock, advertises, pays statutory subscriptions and invests the money to carry on the business? Its members, certainly, and when greater burdens are imposed, or its privileges taken away it is these members who must bear the loss. It is no more distinct from its members than an army, a partnership or any other associations of individuals. Granting them a charter should not deprive them of rights guaranteed to citizens, for that fact does not deprive them of citizenship. A tax upon the corporation is in each case without doubt a tax upon those composing it. By what process of reasoning or principle of justice, men are to have the benefit of this clause, securing to the citizens of each state the privileges and immunities guaranteed to the citizens of the several states, while they remain private citizens, but when they engage in a public

business of profit to themselves and advantage to the nation, are to lose the protection of its just and salutary provisions, is not clear. As a private citizen secured in their rights by the fundamental law; as a public benefactor subject to the rapacity of states. Such a result was, I think, never intended when the constitution was formed, for at that^{time} state greed and the excessive taxes levied by states on the products of other states had brought the nation to the verge of destruction and the dissolution was only averted by the passage of the "commerce clause". Absolute free trade among the states forming the American Union was one of their guiding principles and anything which tended to restrict this free commerce would have been looked upon with the greatest disfavor. It was not intended that such a construction which works a result to which they were so much opposed; viz. the restraint of commerce and taking away from the citizen rights guaranteed to all citizens should be given to that clause of the constitution. It thus seems plain that the doctrine of the corporation being a person and bearing the burdens independent of its members, is false, unjust and contrary to common sense.

The second ground upon which it is held that corporations are not citizens entitled to the provisions of the privilege and immunity clause, is, that when that section was penned, corporations, as citizens, were not present

to the minds of the framers of the constitution; that the provisions of the sections did not refer to, and consequently does not embrace corporations. It is probably and very likely true that when that section securing to the citizens of each state the same privileges and immunities guaranteed to the citizens of other states, was enacted, corporations were not present as citizens, to the minds of those who framed that clause. In a time of such great peril and moment it is not probable that such a mere technicality of law found place in their brains. When a constitution was prepared to take the place of the weak and imbecile articles of confederation, it was based upon broad, fundamental principles founded on their own experience of over two hundred years and lessons learned by the histories of other nations. Its declarations were made for the best interests of the whole people. We believe that every clause

in the constitution meant exactly what it said, and that when it declared that the citizens of each state are entitled to the privileges and immunities of the citizens of the several states, it was intended to apply to all who are citizens; and also that the members of a corporation still remain citizens, (as defined by our constitution with the right to vote etc.) with all the rights of citizens although they may belong to an association doing business under a charter.

It would be interesting to discover when the courts came to the conclusion that a corporation is not a citizen within the meaning of Art. 4, Sec. 2, and ^{see} if the reasoning by which they came to that conclusion is satisfactory. While the courts have uniformly held that a corporation is not a citizen within the privilege and immunity clause, it is a citizen within the clause conferring jurisdiction upon the United States courts in cases arising between citizens of the different states.

Here are two sections penned about the same time and enacted at the same time, namely, the first Wednesday in March, 1789; yet the courts say that a corporation was

intended as a citizen within the meaning of one section, but was not intended as a citizen within the meaning of the other and later section. The process of reasoning by which they come to this conclusion is not clear; nor are historical proofs produced, for none can be found, to justify and explain the difference in construction. The statement that such a distinction exists is made, but no reasons given showing why or how it came to exist. To be consistent it would seem necessary to hold a corporation not a citizen within either section or else a citizen within both, or show cause for not doing so.

That the distinction above made is not a valid one seems verified when it is considered that in the year 1868 the provision entitling the citizens of each state to all the privileges and immunities of the citizens of the several states was practically reenacted in the fourteenth amendment providing "that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Between the above date and the time when the provision was enacted declaring that "the

judicial power of the Supreme Court shall extend to all cases in law and equity etc., etc., etc. arising between the citizens of different states," an immense amount of corporation law had arisen, and Ch. Justice Marshall, in the Dartmouth College case had given his famous definition of a corporation, defining it to be "An artificial being, invisible, intangible and existing only in contemplation of law." Knowing these facts would it not seem proper to hold that if the corporation is to be recognized as a citizen within one provision of the constitution passed in 1789 it should be within another provision passed at the same time; and certainly should be within a provision enacted some 79 years later.

Even in two provisions of the fourteenth amendment another nice distinction is made. For it is held that the clause that no person shall be denied the equal protection of the laws, applies to corporations. (Pembina Co. v. U.S., 125 U.S. 181; Home Insurance vs. New York, 134 U.S. 269). But the clause securing to all citizens the privileges and immunities of the citizens of the different states, does not apply to corporations. No documents, to the knowl-

edge of the writer, justify the holding that a corporation was present to the mind of the framers of the constitution as a person but not as a citizen. In the many debates and articles of that day in reference to commerce and the taxing power, no reference to corporations has been found; and nothing in the constitution warrants the conclusion that such a distinction was made or intended. Time does not permit to take up the reasons sought to uphold the distinction; as for instance, that a corporation is not a corporation within the privilege and immunity clause because a corporation was not really born or naturalized and cannot vote. It is plain that this reasoning applies as well to the jurisdictional clause within which a corporation is held to be a citizen.

The object in trying to show the inconsistencies of the decisions in reference to the words "citizen" and "person", is to prove that there has been no true reason for the distinction; that such a construction is contrary to the real intent with which these clauses were formed; that as affecting corporations the meaning of that clause of the constitution was constructed rather than construed; and that the

legal fiction, so long maintained, namely that the corporation is ^a being separate and distinct from the members composing it, is one which has caused many very shadowy distinctions, and worked much injustice to shareholders. All this confusion and injustice might easily be avoided by removing the cloak of fiction which hides the corporators, and regarding the members of a corporation as men whose rights are guarded by the constitution, and who are entitled to the benefit of its provisions in the same manner and extent as other men, no more no less. The idea that when a discrimination is made in taxing corporations the members are not taxed but that the corporation is the person who bears the burden, and the idea that the corporation is a person at all, is daily growing less and less, and will, I think, soon cease to exist. Taylor says that "the fiction of the legal person has outlived its usefulness and is no longer adequate for the purpose of an accurate treatment of the legal relations arising through the prosecution of a corporate enterprise." Professor Pomeroy agrees with the above view and says it is the one that will ^{soon} be generally recognized.

The opinion seems to be gaining ground among men of great learning on this subject, like those above quoted, that this fiction should be abolished. That it not only does no good but often works positive injury. The law being defined as the perfection of human reason it should see things as they are. It might say "The corporation as a legal entity is so invisible that we cannot see it; so intangible that we can not grasp it. But we can see the men who compose it, who formed it, who direct it, who maintain it and whose money is invested in this chartered business. Because their business is chartered they do not lose their rights as men and citizens; and every provision of the constitution applies equally to the members of corporations as to other men."

This seems to the writer the true solution of the problem of corporate taxation; that the fiction of the corporation as a legal person should be abolished, and the practical effect of the tax upon the members of the corporation, regarded it. Then see whether any rights are invaded which are guaranteed to them as men and citizens.

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The Commerce Clause.

That provision of the constitution which affect the power of the states with reference to taxing corporations engaged in interstate commerce is found in Art. 1, Sec. 8, clause 3, which declares that , "congress shall have power to regulate commerce, with foreign nations, and among the several states and with the Indian tribes". At the present time there is probably no provision of the constitution which is of greater importance, and few which have been the subject of so much litigation, in the attempt to arrive at a true construction of the meaning of the clause as intended by its authors.

To determine this meaning, which is the only true one, a slight historical reference to the condition of the country at the time of the enactment of the above clause, the reasons why the clause was placed in the constitution and the causes which made its insertion necessary, will be of great assistance.

In the colonial times before the passage of the commerce clause there was no general authority over either

foreign or inter-colonial trade. The power of the states to levy taxes on vessel imports etc., arising from other states and countries, was unlimited and unchecked. Some states, taking advantage of their superior harbors, levied heavy and excessive burdens on the less favored states. Little Rhody, by reason of its "fine harbor at Newport, was an autocrat among the states; imposing the most severe taxes upon vessels entering its ports. Such states as New Jersey and North Carolina, surrounded by their more powerful neighbors, were almost taxed out of existence. This soon produced great discontent among the majority of the states; the tendency being to quarrel and bring their adverse interests into collision, and at last to seek separation. Soon the quarrel became so serious as to threaten the dissolution of the Union. It became plainly evident that this great disaster could only be avoided by the national congress itself taking control over the commerce of the country. Ch. J. Marshall said that, "no one of the evils of the federal government contributed more to that great revolution which introduced the present system than the deep

and general conviction that commerce ought to be regulated by congress."

All the evils incident to contracted commercial intercourse were prevalent to an alarming degree, and general ^{dis}satisfaction prevailed. The result of this was only too apparent. So in 1787 a convention was called for the purpose of revising the Articles of Confederation in order "to render the constitution of the federal government adequate to the exigencies of the Union." In other words to discover a means of drawing the nation from the mire of commercial distress into which it had ^{so} deeply sunk. The only way ^{to do this} was to have the subject placed under the control of the national government. This was accomplished by the passage of the commerce clause, which provided that, "Congress should have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." This was placed third among the express powers of congress. It is noticeable that the power to regulate commerce with foreign nations, precedes the grant of power to regulate commerce among the several states. At that day foreign commerce was of immense

moment to the nation; for it was the many evils caused by the restraints imposed by the states on foreign commerce that caused the national government to assume control. Interstate commerce at that time was of little importance; the restrictions upon it were slight and gave no cause for alarm. But at the present day the condition of things is completely reversed. Now it is so well settled that commerce with foreign nations is subject to national control, entirely free from state interference, that the states rarely at the present time attempt to impose any burdens upon such commerce which would affect it in such a way as to amount to a regulation.

But the attempts by the states to tax interstate commerce, and in effect to regulate ^{it}, are many and have in the last fifty years given rise to a great amount of litigation. Miller on the Const. page 113 says, "Out of the multiplication of corporations of all kinds and changes in the methods for the transportation of personal property which have taken place within the last few years, have arisen a vast number of suits before almost entirely unknown, involving

new principles of application and construction.

As from year to year decisions were given declaring that a certain kind of tax was a regulation of interstate commerce, the subtlety of lawyers discovered new methods of taxation which they claimed did not have that effect and were therefore legal. Whether the tax was legal or otherwise must always depend upon the question whether the state has exceeded the powers granted to it by the constitution, or those inherent in it by virtue of its sovereignty; or whether they have encroached upon the domain of national jurisdiction. But to determine whether the state has exceeded its acknowledged power is often difficult, and can only be ascertained by the application of those principles which have been established in the course of time. The method of determining the question has changed more than once, with the change in the personnel of the court and consequent change in its political opinions. So to learn the nature of the line which separates state sovereignty from national authority, with reference to the power of taxation, a study of the decided cases involving the question becomes necessary.

The first case upon the subject and a great one, is that of *Gibbons vs Ogden*, 9 of Wheat. 1, in which Ch. J. Marshall rendered the unanimous opinion of the court. It was held that a law of the state of New York, granting to Livingstone and Fulton the exclusive right to navigate all the navigable waters of the state, in vessels propelled by steam, was invalid; being inconsistent with the federal coasting license laws, which conferred upon vessels duly enrolled under these laws, the right to navigate all navigable waters of the United States. Therefore the laws of New York were superceded and abrogated by the laws of the U. States with which they were inconsistent. Johnson concurred with Ch. J. Marshall but declined to base his opinion on the same ground. He held that the laws of New York were an interference with, and regulation of interstate commerce. That the state could in no way regulate such commerce it being entirely subject to the control of the national government. He declared that were the coasting laws to be abrogated, as the New York act was unconstitutional, independently of the coasting laws, the decision should still be the same. In construing the word "regulate" the learned Ch. Justice points out the dif-

ference between the admitted power of the state to affect commerce, and in a certain way to control it, as by the operation of quarantine laws, health laws etc., and to regulation of that commerce. That is, the difference between the exercise by the state of its police power, and that point where the state exceeds its authority. The respective powers of the national government and that of the states is thoroughly discussed. It was held by the Ch. Justice, that over foreign and interstate commerce the power of the general government, when exercised was supreme. Johnson held that over such commerce the states could have no control whether congress had or had not acted.

The case of Brown vs. Maryland, 12 Wheaton 419, decided that a law requiring an importer to take out a license and pay fifty dollars before he should be permitted to sell a package of imported goods, was in conflict with the commerce clause of the constitution. The Ch. J. in that case declared, that a tax upon the importer was equivalent to a tax upon the importation and was consequently a regulation of commerce. Commerce he said included not only trade but intercourse and the various agencies necessary to the exer-

cise of that trade and intercourse. But if the law passed by a state does not amount to a regulation of commerce, but is simply an exercise of the police power, it will be held valid, although the tax affects commerce and to a certain extent hinders it; as in the case of Willson vs Black Bird, Creek Marsh Co. 2 Peters 245, where the state of Delaware had authorized the company to dam a small navigable, tidal creek, for the purpose of reclaiming marsh land and improving the drainage of the surrounding territory. Plaintiff, the owner of a sloop licensed under the U. States coasting laws, ran into the dam with his vessel and injured it. Willson claimed the damming of the creek obstructed navigation, and therefore regulated commerce; but Ch. J. Marshall said, "The value of the property on the banks of the creek must be enhanced by excluding the water from the marsh and the health of the inhabitants probably improved. Measures calculated to produce these objects provided they do not come into collision with the powers of the general government are undoubtedly within those reserved to the state." This case is a very close one and the statements of Ch. J. Marshall with reference to the respective powers of the state and

national government appear to be contrary to those in *Gibbons vs. Ogden* (9 Wheat. 1), although he decided both cases.

In this case he seems to hold that the power of taxation is concurrent, while in *Gibbons vs. Ogden* he cautiously avoided expressing any opinion on this subject; Johnson there declared that the power of taxation was not 'concurrent' but was 'absolute' in the national government. Another example of the excess of the police power is found in the case of *City of N.Y. vs. Milner* (11 Peters 102). A case involving the validity of the law of the state of New York, requiring the masters of all vessels arriving in the city of New York from other countries or states, to make to the city authorities within twenty four hours after arriving, a written report containing the names, ages and last place of settlement of all passengers landed in the city, from their respective vessels. It was contended that this was a regulation of commerce but Judge Bronson held that although it closely approached "the line which separates regulations of commerce from those of police" it was a valid police regulation. Two cases which gave the judges great concern are the

License cases, 5 Howard, 501 and the Passenger cases 7

Howard, 283. The former cases involved the validity of law preventing the sale of liquor in small quantities and without a license previously obtained from the state authorities.

The Passenger cases 7 Howard, 283, involved the validity of laws of Mass. and N.Y., imposing a tax upon every non-resident passenger landed within the state from every vessel arriving from a part of some other state or country. Up to the time of the decision of these cases the question of the "concurrent" or "absolute" power of taxation had given the court no great trouble. The courts previous to this decision had declined to pass upon that question but during the time the License and Passenger cases were decided and the time when *Miller vs. City of New York*, was decided, there had been a great change in the personnel of the court; many of the judges being advocates^{of the} extreme states-rights theory, pressed^{ed} into service every argument which they could think of to aid their cause. So the question of the 'concurrent' power played a great part in deciding those

cases, for although in the license cases the decision ~~decision~~ was unanimous that the tax was a valid one, yet the reasons for so deciding differed widely; four judges holding that the tax was not a regulation of foreign and interstate commerce, and that therefore no constitutional objection could be raised against the tax under the constitution. But Ch. J. Taney held, Catron agreeing, that the tax was a regulation of foreign and interstate commerce, but yet-- the power of taxation was concurrent in state and nation, and as the nation had not exercised the power in such a case the state might. He argued that since the state could pass quarantine laws pilotage laws etc., which operated upon commerce, the power of the state must be in concurrent. It was this case that Justice Woodbury first laid down the doctrine, now perhaps recognized as the governing one, that over subjects, local in their nature the power of the state is concurrent, but over subjects national in character the power of congress is exclusive. It was at last settled to this effect in the case of Cooley vs. Board of Port Wardens, 13 Howard, 299.

The question of the concurrent power played a very important part in the passenger cases. But aside from this question which has now been practically settled, the doctrine of the power of the states to impose restrictions upon foreign or interstate traffic was thoroughly discussed. Justice Woodbury said that "many subjects of legislation are of such a doubtful class and even of such an amphibious nature, that one person would arrange and define them as matters of police, another as matters of taxation and another as matters of commerce." To decide on which side of the line they fall, he thinks the intent, the object of the law must be the guide. It seems, however, from a consideration of the cases cited that not by the intent, but rather by the effect of the law, must it be determined whether a tax amounts to a regulation of commerce. But certain police powers of the state although they control commerce are valid, and not subject to the provisions of the commerce clause. The cases make this distinction, that the police laws only affect, operate upon, etc., etc., foreign and interstate commerce, but do not regulate it. This distinction has given rise to much controversy and many subtle arguments in

explanation. But taking the real effect of the decisions they appear to amount to this: that no state can regulate foreign or interstate commerce, unless by the passage of laws which are within the power of the state in the exercise of reasonable police regulations. But to put it that way, would be contrary to the constitution, as no exception is made to the rule that congress shall regulate such commerce. Then the sole question to be determined in each case as it arose would be whether the state had exercised its police power justly. ^{The} Case of Cooley vs. Port Wardens, 12 Howard, 299, requiring certain vessels to have pilots or if not, such vessels should pay pilotage fees not paid by others, finally settled the question of the concurrent and exclusive power of congress & of the state, to the effect that the exclusive power of congress extends to all subjects that are national in their nature and admit of a uniform system of regulation. The only way we can determine what subjects are national in their nature and what are not is by the citation of a few cases involving that question. In Crandall vs. Nevada, 6 Wall., 35, it was held that every railroad, stage, or any person engaged in the business of transporta-

tion should pay to the state one dollar for every person carried through the state. It was decided that such a tax levied on the carrier was in reality a tax upon the passenger who must pay that much more. It was held void, because it affected not only the people of Nevada but others.

In *Henderson vs. Mayor*, 92 U.S., 259, it was held that a statute of the state of New York, requiring a ship-master as a pre-requisite to landing his passengers, to report in writing within twenty four hours after arrival, the name, last residence, and birth place of every passenger, not a citizen of New York; or in the alternative pay a small sum of money for each one of them, was invalid. It was not a local tax but affected a subject national in character. This case probably overrules *City of New York vs. Miln*, where the facts were nearly the same.

But although the tax might be strictly local in character, yet if it amounted to a regulation of commerce, the tax could not be enforced. As in the case of *Welton vs. Missouri*, 91 U.S., 270, where a state law

attempted to impose a tax upon all persons peddling within the state the products of other states or countries. It was held unconstitutional although the law was local and was so expressed. Again in Walling vs. Michigan 116 U.S., 265, a law purporting to impose a license tax, upon persons engaged in selling liquor within the state was so drawn as to discriminate in favor of liquor manufactured in that state, was held a regulation of inter-state and foreign commerce; and so was unconstitutional, although the tax act expressly declared that the tax was imposed only on liquor sold within the state.

It was soon seen that this method of determining

whether a tax was unconstitutional, was not a sure or safe one and the court sought for a different criterion by which to determine the limits of state power to impose taxes upon foreign and interstate commerce. It seems that in *Robins vs. Shelby Taxing District*, 120 U.S., 489, they returned to the old way of determining the question, by considering it with reference to the police power of the state. It was there held that a tax on all persons selling goods by sample within the district and not having a regular place of business there was unconstitutional as discriminating against such houses not doing business within the city of Memphis. In that case Justice Bradley laid down those three fundamental principles, 1--That over subjects national in their character the power of congress is exclusive. 2--Where the power to regulate commerce is exclusive any failure on the part of congress to act indicates its will that the subject shall be free from all restrictions and impositions.— 3--That the only way interstate commerce can be affected by state laws, is by the exercise of the police power, as by inspection and quarantine laws, and laws passed for the

purpose of guarding the health and morals of the people. But previous decisions tend to show that the police power cannot be exercised in an unreasonable manner; that is, "it may not interfere with transportation into or through the state beyond what is absolutely necessary for its self protection." *R. R. Co. vs. Hillson*, 95 U.S., 465; there a state law prohibited the importation into the state, of Spanish, Mexican or Indian cattle, from the first of March to the first of November of each year, to protect the state from an infectious cattle disease known as Texas fever. Although it was apparently passed as a health regulation the court thought the restrictions were unnecessarily severe. More severe than was necessary for accomplishing the purposes of the act, consequently void. So in the case of *Chy Lung vs. Freeman*, 92 U.S., 275, where the owner of a vessel was required to give bond of \$500 dollars in gold, conditioned to indemnify all the towns, cities and counties of California generally for the support and maintenance for two years of plaintiff, a Chinese lady.

Miller said "the statute of California goes so far beyond what is necessary or even appropriate for the purpose

as to be wholly without any sound definition of the right under which it is supposed to be justified." These decisions were based upon the unreasonableness of the tax; but in certain cases the state may perform acts which appear to impose great restrictions upon commerce, for it is well settled that a state may authorize obstructionn of a navigable stream or other body of water, by dams or bridges in any manner it may see fit (Gillman vs. Philadelphia, 3 Wall., 713).

If a tax affects commerce but indirectly or remotely, it is valid; as a slight tax on engineers. (Smith vs. Ala. 124 U.S., 465.)

A law requiring engineers to be examined for color blindness is a valid law within the police power of the state; the object being the safety of the people; also harbor improvement laws, County of Mobile vs. Kimball, 102 U.S., 691. Another valid exercise of the police power is that railroad companies shall post copies of the rates of transportation. (Railroad Company vs. Fuller, 17 Wall., 560). But a law requiring all common carriers, while carrying

passengers within the limit of the state to furnish the same accommodations to white and colored passengers was unconstitutional as a regulation of inter-state and foreign commerce.

The late case of *Leisy vs. Harden*, 135 U.S., 100, held that a law passed by the state of Iowa, prohibiting the sale of any intoxicating liquors within the state, except for pharmaceutical, medicinal, mechanical, and sacramental purposes, and under a license from a county court of the state, is, as applied to a sale by the importer and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in or brought from another state, unconstitutional and void, as repugnant to the clause granting to congress the power to regulate foreign and interstate commerce. It was not within the police power of the state. Cites *Brown vs. Maryland*, 12 Wheat, 419, "That the point of time when the prohibition to tax ceases and the power to tax commences is not the instant when the article enters a country, but when the importer has so acted upon it, that it has become incorporated and mixed with the general mass of property in the country."

The police power of the states is considered fully in the liquor cases; viz. *Liesy vs. Harden supra*; *Mugler vs. Kansas*, 123 U.S.; *Bowman vs. Chicago R.R.*, 125 U.S. 465; *In re Rahrer* 140 U.S., 545; and in the Elevator case, *Munn vs. Illinois*, 94 U.S.; and in the Grange cases, 94 U.S., and 134 U.S.; and in the Slaughter House cases, *Brimmer vs. Rebman*, 138 U.S.; and *Minnesota vs. Barber*, 136 U.S.

The cases *Hall vs. Dequir*, 95 U.S., 485, and *Foster vs. New Orleans*, 94 U.S., 246; and *Morgan vs. Louisiana*, (which decided that quarantine laws affecting inter-state commerce are valid) held that laws of the state which hinder commerce of a national or general nature, can only be sustained where the state has justly exercised its police power.

It is well settled that no state can impose any tax discriminating unjustly in favor of its own citizens when that tax amounts to a regulation of commerce. Thus, when the state of Maryland passed an act which provided that all merchandise brought into a certain city and landed at its wharves, which were the produce of the state of Maryland, should pay no tax for the use of such wharves, but that all

similar articles brought into that port from any other state should pay a tax for the use of the wharf upon which it was landed. The court held that it was not intended to raise money for the use of the wharf. That they had a right to do if they had laid a reasonable tax for its use and had laid it alike upon the produce that came from every state. But the tax was a mere devise to foster the domestic commerce of Maryland by unequal and oppressive burdens upon the commerce of other states and by unjust discriminations. (Guy vs. Baltimore, 100 U.S. 434) Also see Walling vs. Michigan, 116 U.S., 465, and Robins vs. Taxing District 120 U.S., 489, both discussed supra and holding that the state can not make unjust discriminations.

The principles which determine the respective power of the national and the state government have been laid down in the preceding cases. The criterion for determining the question was not always the same; for we have seen that at first the police power of the state with reference to the commercial power of congress formed the dividing line; then, the question^{whether the tax} was levied upon commerce local in

its nature, or upon commerce general in its nature and admitting only of one uniform system of regulation; and again, whether the tax was reasonable or unreasonable. But it seems that in the later cases a new mode of determining this question has arisen; viz. on what is the tax imposed? Its property, its capital stock, its franchises or its gross receipts? It was said in the case State Freight Tax, 15 Wallace 232, decided twenty years ago, "The constitutionality of a tax is to be determined not by the agency through which it is collected, but by the subject upon which the burden is laid."

Without adopting this rule as the true one, perhaps it would be well to consider the power of the states to control inter-state and foreign commerce in accordance with the rule, and determine if we can, the validity of taxes imposed by the states upon the property, franchises, capital stock or gross receipts of corporations engaged in inter-state commerce. For nearly all the later cases have arisen because of the imposition by the state of a tax upon such corporations.

The object intended here is to discuss those later cases of taxes imposed on inter-state corporations by the states, and also to discuss what seems to be the present rule; viz. that the constitutionality of a law is to be determined by the subject upon which the burden is laid. Then knowing the decisions in previous cases and in cases in which a corporation was not a party, see if the same principles which were applied in the early cases were applied in the later, or how far modified or altered.

T a x o n P r o p e r t y .

It is settled law, and has always been the rule I believe, that the state has power to tax property within its jurisdiction. This rule is too universally acknowledged to need a citation of authorities. Nearly all the cases which discuss the power of the state to impose taxes, simply mention the fact incidentally in connection with the question of the power of the state to impose taxes upon subjects other than property. It may not only tax the property within its jurisdiction of persons and of corporations engaged in inter-state and foreign commerce, but

may levy such a tax although the corporation carries on a business national in character and acts under the laws of the United States. This was decided in *W. Union Tel. Co. vs. Mass.*, 125 U.S., 530. A tax upon the property of a railroad company, acting under a franchise from the U.S., is valid. (See *Cal. vs. Pacific R.R. Co.* 127 U.S. 1 p. 40.)

Whether the tax is valid depends upon the question whether the property was within the jurisdiction of the state when the tax was imposed. That is, at what moment does the power of the state to tax commence and at what moment does it cease? As early as *Brown vs. Maryland* 12 Wheat. 419, where a state law required a importer to take out a license and pay fifty dollars therefor, Ch. J. Marshall said, "The point of time when the prohibition to tax ceases and the power to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the general property of the country." In *Coe vs. Errol*, 116 U.S., 517, it was said that goods intended for exportation to another state, are liable to taxation as part of the general mass of property of the state of their origin

until actually started in course of transportation or delivered to a common carrier for that purpose. At the moment they have begun to be transported from one state to another, they are subjects of inter-state commerce under national control, and cease to be taxable by the state of their origin. It was also said that goods passing through the state though temporarily detained, as by a storm, breakdown etc., were not subject to state taxation. The principle involved in this very last statement received thorough consideration in the recent case of Pullman Palace Car Co. vs. Penn., 141 U.S., decided May, 1891. There a statute of the state of penn., taxing certain cars which passed into, through and out of the state, and which were owned by a corporation created in another state, was held a valid law not in conflict with the commerce clause of the constitution. A large number of those cars were constantly within the state. The tax was determined by taking as the basis of assessment such proportion of its capital stock as the number of miles over which its cars are run within the state, bears to the whole number of miles over which its cars are run. Justice Gray said, "It is well settled that

there is nothing in the United States constitution which prevents a state from taxing personal property employed in inter-state or foreign commerce, like other personal property within its jurisdiction." He said the old rule that personal property could only be taxed at the place of business of the owner, was simply founded on comity, and that comity might be withdrawn, repealed, modified or limited. He held that the property had so mingled with other property in the state as to become a part of the general mass of the property therein and to have to acquired a Situs in the state. He gave the following strong argument in support of the decision: that were the decision otherwise, property used as a means of inter-state commerce would be free from taxation. Bradley with Field and Harlan dissented on the ground that the property had acquired no situs within the state.

C a p i t a l S t o c k .

It will be seen from the last case that the tax was on property measured by taxing the capital stock in a certain way. If the subject upon which the tax is laid is

to be the criterion as to its validity, we notice that in the above case the tax was laid upon the property; its measure, its extent, ascertained with reference to the capital stock of the company. The difference between the two must be distinguished: between laying the tax upon the thing, and between ascertaining the amount to be laid upon that thing by a tax upon something else. As far as taxing the capital stock is concerned the decision in Pulman Palace Car Co. must be deemed to have settled the question to the effect that the latter method is valid. But whether a tax levied directly upon the capital stock would be held valid at the present day is still, I think, a doubtful question: for, although in the case of Delaware R.R. tax, 18 Wallace it was held that a tax of, "one fourth of one per cent. upon the actual cash value of every share of its capital stock was valid; Yet the decision either seems to have been disregarded by the judges, for words used by them ^{in later cases} seem to tend to a contrary doctrine. Generally the case is not mentioned in the discussion of this question. Justice Bradley in the Tax Cases, 92 U.S. concedes that inter-state

corporations may be taxed upon their capital stock. But it does not appear whether he means a direct tax upon the capital stock or whether he means a tax levied upon it in order to ascertain the amount levied directly upon something else. The latter is valid so far as a tax upon the capital stock is concerned; the former(?). Since the Delaware R.R. case, I know of no decision upon the question; its force has not been great nor does it appear to be looked upon as authoritative; for instance, in the case of Home Insurance vs. New York, the attorney for the Plaintiff contended that the tax was upon the capital stock and was therefore void. The validity of such a tax, directly upon the capital stock, is doubtful; but a tax upon the property, the extent of the tax being measured by a tax upon the capital stock is valid.

F r a n c h i s e s .

It is settled at last, after much diversity of opinion, though but few decisions on the subject, that a tax levied by a state upon the franchise of a corporation engaged in inter-state commerce, is valid. Cook says the

"power to act as a corporation within a state is a franchise." Another says, "The privilege of doing business as a corporation is a franchise. Yet it was said by Justice Bradley in State R.R. Tax cases, 92 U.S., 575 in his dissenting opinion, "I lay down the broad proposition that by no device or evasion, by form of statutory words can a state compel citizens of other state to pay to it a tax, contribution or toll for the purpose of having their goods transported through that state by the ordinary channels of commerce." The doctrine that the franchise of an interstate corporation, can not be taxed, appears to find favor in Justice Gray's opinion delivered in the Pullman Car case 141 U.S., when he says, "This tax is not one on business or occupation, it is not a license or privilege tax but is in substance and effect a tax upon property." There he seems to imply that if it had been upon the franchise the tax would have been void. Such a tax was held void in U.S. vs. Allen, 39 Fed. Rep., 712, by the Supreme Court of Tenn., where a tax of \$1,000 was levied on an express Co. for the privilege of doing business within the state.

The defense was that it was not a tax upon the business but for the privilege of doing business; but the court sensibly said, "The tax carried to its logical result bears as hardly upon the company in one case as in the other." Morawetz also seems to doubt whether a tax could be imposed upon the franchise of an inter-state corporation. He says, "It is probably true that the right of railroad companies to act in a corporate capacity as a means of carrying on any particular branch of commerce, between the states or with foreign countries, is secured by the constitution. But even if a state were bound to grant a company, (as a railway company) the right of acting in a corporate capacity within its limits, the state would undoubtedly retain the power of making reasonable regulations for its government, etc., etc.;" But it is now settled contrary to what would appear to be the rule by reading the above cases and quotations, by the case of Grand Trunk Railway vs. the state of Maine, 142 U.S. 217, that such a tax is valid. This case will be discussed later in another connection. People vs. Wemple, 117 New York 136, also holds that the franchise of an inter-state corporation may be taxed. But it is equally well

settled that if the corporation is engaged in inter-state commerce, and is acting under a franchise from the United States, that franchise can not be taxed. (California vs. S. P. R. R., 127 U.S. 1). The Maine case leaves no doubt that the state has the power to tax the franchise of a corporation carrying on inter-state commerce, provided the corporation is not acting under a franchise granted by the United States. *See Horn Silver Mining Co. v. U.S. directly in point holding that this franchise may be taxed. 143 U.S.*

Taxation of G r o s s R e c e i p t s.

Most of the taxes are levied upon corporations doing business national in character have been imposed upon, or measured by, a tax upon the gross receipts. The first great case upon this subject is the State Tax on Railway Gross Receipts 15 Wallace, 284, decided in 1872; there a statute of the state of Penn., imposing a tax upon the gross receipts of a railroad company, was held valid; although the gross receipts were made up in part from freights received for the transportation of merchandise from the state to other states, and into the state from other states. This decision immediately followed the State Freight Tax case, 15

Wallace, 232, which had decided that a tax imposed upon the freight itself, which passed in and out of the state was unconstitutional as a regulation of commerce. It was expected that the same decision, based upon the same principles, would be reached in the case of State Tax on Gross Receipts. But the two cases were sought to be distinguished; it being held that when the tax was on the freight it was imposed directly upon a subject of inter-state commerce; upon the gross receipts, it was not.

This distinction does not seem sound, for the difference between taxing the freight and taxing the proceeds derived from the transportation of that freight, is slight, while the result of the two is virtually the same. This was the reasoning of the court in *Fargo vs. Michigan*, 121 U.S. 230, decided in 1886, which held that a statute levying a tax upon the gross receipts of R.R. companies for the carriage of freights and passengers into, out of and through the state, was a tax upon commerce among the states and therefore void. This case was soon after followed by *Phil. and Southern Steamboat Co. vs. Penn.*, 122 U.S., 326, which held that a tax upon the gross receipts of the steamboat company

incorporated under the laws of Penn., which receipts were derived by the transportation of persons and property by sea between different states and to and from foreign countries, was in conflict with the exclusive power of congress under the constitution. These cases as far as the decision goes are directly opposed to the case of state tax on gross receipts, which held that the gross receipts could be taxed. A distinction was sought to be made in the latter cases, by saying that the tax in *15 Wallace* amounted to a franchise tax. But it may be considered, and is I think so considered, that *Wargo vs. Michigan*, and *Steamboat Co. vs. Penn.* have overruled the case of state tax on railway gross receipts. Justice Bradley said that the reasoning on which the last named case was founded might well be doubted; and showed plainly by inference that a tax upon the gross receipts, levied upon a subject of inter-state commerce, could not be legal, in trying to uphold its validity by declaring it to amount to a tax upon a franchise.

In *Le Loup vs. Port of Mobile*, 127 U.S., 640, it was held that a tax measured by the gross receipts was void,

although it was declared to have been levied for the privilege of carrying on business. Justice Bradley said, "In our opinion, no state has a right to lay a tax on interstate commerce in any form; whether by way of duties laid on the transportation of the subjects of that commerce or the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden to that commerce and amounts to a regulation of it which belongs solely to congress."

That the case of State Tax on Gross Receipts is considered over-ruled, even by the state courts, will be seen from reading Vermont R.R. vs. R. R., 21 Atlantic Reporter, 731; Del. and H. canal Co. vs. Con. 17 AT. Rept., 175, where it was said that a tax on the gross receipts was void so far as it related to receipts derived from points within and point without the state; and State vs. Woodrough Coach Co., 15 N.E. Rep. 814. These cases are directly in point, purport to follow Fargo vs. Michigan and Steamboat Co. vs. Penn., and yet declare directly, that a tax levied upon the gross receipts of an inter-state corporation is void.

The law is equally well settled to the same effect, when the tax is imposed on the gross receipts of a telegraph company, where such receipts are derived in whole or in part from inter-state commerce. (W.U. Tel. Co., 132 U.S. 472; Le Loup vs. Port of Mobile, 127 U.S., 510; Tel Co. vs. Texas, 115 U.S. 460; Beach Sec. 823). But is valid when levied on intra state gross receipts of telegraph companies. (Waterman W.U. Tel. Co., 127 U.S.). But although the telegraph company acts under a franchise from the United States, it is subject to a tax upon its property. (W.U. Tel. Co. vs. Mass., 125 U.S., 530).

In the cases discussed with reference to the power of the state to tax corporations, the tax has been imposed upon one of the four following things: its property, its capital stock, its franchises or its gross receipts. It seems that when the tax is not levied upon one of these, but is declared to be upon the corporation, which we assume is doing an inter-state business, the constitution construes the law very strictly. As, in Crutcher vs. Kentucky, 141 U.S. 47 where a fee of five dollars and a statement of the company's assets and liabilities was required, before being per-

mitted to do business, was held to be beyond the police power of the state. And in R.R. Co. vs. Penn., 136 U.S. 113, a direct tax upon an inter-state corporation was held void. Also, in Mc Call vs. Cal., 136 U.S., 104, where an agent in California, whose business was to induce passengers to take the N. Y. L. E. & W. R.R., but who did not even sell tickets, was taxed twenty five dollars, it was held to be in conflict with the powers of congress, such a tax regulating one of the means of commerce. Having now briefly discussed most of the case decided by the United States court,, with regard to the power of the state to tax inter-state and foreign commerce, the limits of that power and the principles governing the cases, we are now prepared to examine the last, and at the present time perhaps, the most important case upon this question.

The case of the State of Maine vs. the Grand Trunk R.R. of Canada, 142 U.S. 217, was decided but six months ago by a divided bench, four judges dissenting. The defendant railroad extended from Portland, Maine to a certain place in the State of Vermont, a distance in all of one hundred

forty nine and one-half miles, of which eighty two and one half miles are within the state of Maine. The state of Maine imposed "an annual excise tax for the privilege of carrying on its business." "The amount of the tax shall be determined as follows: the gross transportation receipts of such railroad line or system as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile; and the gross receipts in this state shall be taken to be the average gross receipts per mile multiplied by the number of miles operated within this state." Justice Field, delivered the opinion of the court. He said, "This is a tax upon the corporation for the privilege of exercising its franchise within the state of Maine. It is so declared by the statute." "It is not a tax upon the receipts but a resort to those receipts to ascertain the value of the franchise." He said that Steamship Co. vs. Penn. did not conflict because that was a tax in terms upon the gross receipts. Bradley with Lamar Harlan and Brown dissented. Bradley's opinion is so valuable that it should be given in full, but this can not now

be done. It is short, pointed and emphatic. His argument was that though the tax purported to be upon the franchise, it really was upon the gross receipts. But the majority of the court thought otherwise and held the tax valid. Doubt has been expressed as to the correctness of this decision by men of great learning; but the mere fact alone, that four judges dissented, shows that a person's opinion as to whether the decision was a proper one, is entitled to respect no matter what side he believes correct. The case certainly decides that a franchise of an inter-state corporation can be taxed; it also certainly decides that the amount of the franchise tax can be ascertained by a tax levied upon the gross receipts. Judge Field cites, to sustain his opinion, but one case, *Horne Insurance Co. vs. N.Y.*, 134 U.S. 594. There a portion of the capital stock of the Co. was invested in U.S. bonds. The state passed an act that such a Co. should pay a tax on its corporate franchise or business to be computed by their dividends. It was held the tax was valid. The decision does not sustain Justice Field for two reasons: 1--The decision turned upon the point whether the tax was

upon the U.S. bonds, and 2--A state may impose any tax it sees fit upon an insurance company such an association, not being regarded as carrying on an inter-state commerce business; nor does the case cited by the attorney for the state bear out his position, for in the Del. R.R. Tax case which was held valid, the tax was not upon the gross receipts but upon the capital stock. Another thing tending to show that this case has no previous adjudication to sustain it is the fact that Justice Field said it did not conflict with the cases holding the tax on the receipts void, and the attorney for the state tried to show that the State Tax on Gross Receipts case was not overruled and based his whole argument upon that case. While the cases I have cited show there can be no doubt that that case was long ago discredited. Justice Field said that the case of Steamship Co. vs. Penn. did not conflict with his opinion in this case, because there the tax was levied in terms upon the gross receipts. If this is all the distinction between the two it certainly is not a valid one and is in contradiction to the words of the learned judge in Welton vs. Missouri, where he held a tax on the importer was in effect a tax on the thing imported, and that such a tax

only varied the form without varying the substance. And this gives rise to a very practical question, viz. are we to regard what the legislature says the tax is levied upon when it is measured by something else; or are we to see upon what the tax is actually laid, and what is the effect of such a tax. A few cases will show, I think, that the last is the rule adopted by the court, for in the case of *Le Loup vs. Port of Mobile* 127 U.S., it was held that a tax purporting to be for the privilege of carrying on business (which is a franchise, as in the Maine case), measured by the gross receipts (as in the Maine case) was void. The principle of the two cases are exactly the same. There it was held that the tax was in effect upon the gross receipts. This reasoning appears sound, for in this case as in the Maine case, were the state to say the tax was levied upon the gross receipts and measure its extent in the same way, it would amount to exactly the same number of dollars and cents. In *Guy vs. Baltimore*, 100 U.S., 434 it was held that a tax for the use of a wharf was in reality a tax upon persons landing at the port, also in *Chy Lung vs. Freeman*, 92 U.S., where a law declaring itself a police

regulation was held a tax on ship owners and so a tax on commerce. And in *Richard vs. Pullman Car Co.* it was held a tax declared to be on property was not in reality a property tax. This principle that the effect of the statute must be considered, has been recognized from the earliest days, for Ch. J. Marshall said in *Brown vs. My.*, 9 Wheat., that a tax upon the importer was a tax upon the importation. Also in *Crandall vs. Nevada*, the real effect of the law was held to be different from that declared by the state legislature. If these cases have settled the doctrine that the real effect of a tax must govern and not the declaration of the state legislature; and if the proposition with which we started out is true, viz. that the validity of a tax is to be determined by the subject upon which it is imposed, then in the Maine case the tax must be held to have been imposed upon the gross receipts, and that being true should follow the decisions of cases herein cited holding such a tax void. Applying the principle in the telegraph cases that a tax on the gross receipts derived partly from inter-state traffic is void, we find authority and cases holding that the same principles

apply to railroads. We have the words of Justice Field himself in Tel. Co. vs. Texas, 115 U.S., 460, that a telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. In the Maine case the tax was imposed upon the gross receipts derived partly from state and inter-state commerce. The telegraph cases have uniformly held such a tax void. The Maine case is in effect a tax on the gross receipts and so by former cases would have been void. But it is of course the law now as applied to the exact state of fact under which it arose. We have seen the controversy which arises over the various ways the tax is imposed; upon the property valid; upon the franchise valid; upon the gross receipts void, except under the circumstances of the Maine case. While in every case the real result upon the corporation is exactly the same; the amount of the tax is the same, the effect on commerce is the same. It is with considerable hesitancy that I offer any individual opinions upon such a difficult question as this, and upon the Maine case and the present rule of determining the validity of a tax. This question is one

over which there has been much controversy, and one upon nearly every point of which, controlling principles have been applied but for a short time and at irregular intervals. However, it seems to the writer that the discussion whether the tax could be laid upon the franchise, or upon the capital stock or upon the gross receipts, is a somewhat metaphysical one. It is held valid or invalid, depending upon which one of these things it is levied. The distinction, I think, is unwarranted; for no matter upon which one it is levied it is still a tax; the amount to be paid is the same and so the effect upon commerce is the same. If there were a difference in the result in the commerce of the country, by the fact that the tax was levied on one thing or another, a reason for making the distinction would plainly appear. But there is no difference in effect. The commerce of the country is affected as much when a corporation transacting inter-state business is made to pay \$5,000 for its franchise, as when a tax amounting to \$5,000 is imposed upon its gross receipts. At present corporations, railroad corporations at least, may be taxed upon their property within the jurisdiction of the state (which

is just)). They may also be taxed upon their franchise, their capital stock, and in effect upon their gross receipts. And Justice Bradley assures us in the Maine case that a tax may be levied, not only on one of these but upon all of them; the tax being levied to the same extent upon each that it could be if only imposed upon one.

This result grew out of the decisions that a tax could be levied on certain subjects connected with corporations, and could not on others. A tax is a tax. These corporations are engaged in inter-state commerce and a tax regulates that commerce or it does not. There is no middle ground. As these various ways of levying the tax all affect equally inter-state commerce, the principles which we apply to them should be the same; I can see no possible reasons for making the distinctions made: they have resulted in this that at the present day inter-state corporations, railroads at least, can be taxed by the state to almost the same extent as foreign corporations; and, as Ch. J. Marshall said, "The power to tax involves the power to destroy", they can put the tax so high as to compel the corporation to cease

business within that state; for if they can tax at all they may tax as they will; because, the question is not is this tax too high? The simple question is can the state levy such a tax at all? Does it impose a tax upon inter-state commerce?

The only consideration that deters the states from imposing enormously high taxes upon inter-state commerce, is that of self interest; But I think I am justified in saying inter-state commerce can be controlled to a great extent, by the states. (I will not say regulate it, for the courts emphatically deny that it can be regulated by the states, that being contrary to the constitution).

If a tax clause should say, "Every corporation shall pay a fee of five dollars for the privilege of doing business" that would be held invalid. (Crutcher vs. Ky., 141 U.S.) But if it should say the tax is levied upon the franchise, or upon the capital stock of the corporation, the tax would be sustained. In this way inter-state commerce, when the agency of that commerce is a corporation, can be controlled. This result has been brought about gradually,

and perhaps unintentionally. It is the same result that chiefly led to the adoption of the present constitution, in the attempt to reconsolidate the Union. It is the result arrived at in construing that provision of the constitution which says that congress shall have power to regulate commerce with foreign nations, among the several states and with the Indian tribes. Ch. J. Marshall once said, ^{that} in construing the constitution that great effect is to be given to contemporaneous exposition. And ^{the} contemporaneous exposition and history of that time, show us that the commerce clause was then construed to the letter; and it is to-day when applied to subjects of inter-state or foreign commerce, in every case but one. And that is where the taxation is levied upon a corporation. There the decisions justify us in saying, that by the methods adjudicated to be legal, a corporation engaged in inter-state commerce can be taxed to any extent, and to that extent inter-state commerce is controlled. As at the present time the greater number of large enterprises in the country are managed by corporations, and a tremendous amount of business is

under their control, the power of the states over commerce national in character must be admitted. This is without doubt, contrary to the intention of the constitution.

Our history shows that when the commerce clause was enacted, the feeling was universal among statesmen of all parties, that inter-state commerce must be regulated by congress, free from any impositions or restrictions imposed by the states. This feeling is yet strong. Justice Bradley said in the *Maine* case that "there is a deep and general conviction that commerce ought to be regulated by congress." Justice Miller in his lectures on constitutional law at page 81 said, "There is no doubt that if the commerce clause were removed to-morrow this Union would fall to pieces, simply by reason of the struggles of each state to make the property owned in other states pay its expenses." And Justice Story said that the power to regulate commerce is a power "vital to the prosperity of the Union, and without it the government would hardly deserve the name of a national government, and would soon sink into discredit and imbecility; it would stand as a mere shadow

of sovereignty to mock our hopes and involve us in common ruin."

The words quoted, instead of creating a feeling of alarm, are apt to cause us to feel a happy consciousness that we live in one of the most secure countries on earth, whose people are the most contented and have the most to be cont^{ent}ed with. Still, if it were so, that the state could control inter-state and foreign commerce in general, we would have great cause for alarm. It is only when the party taxed is a corporation, that means have been legalized, which in effect allow the states to control inter-state commerce. This has brought about a result so far as corporations engaged in inter-state commerce are concerned, directly opposite to that intended by those who framed the commerce clause and yet without being declared in conflict with that clause. Such a result was occasioned by a fear of the rapid growth of corporate enterprises and consequent creation of monopolies. Whether such fear is well founded is a question of economics. We may always rely upon the wisdom of our judges to see, that, although logically such taxation of corporations amounts to a restraint upon inter-

state commerce, the states will never be allowed to so exceed their powers, as to cause any material injury to the Nation. Law, is to a large extent, the application of business principles to the commercial relations of individuals. The judges, I believe, in deciding this question of corporate taxation, both foreign and inter-state, have been governed as much by practical considerations as by precedent; and their decisions always were and are, intended for the best interests of the whole people.

So we have nothing to criticise in the decisions; not even the tax on inter-state corporations. For the judges have met the necessity half way, in construing the constitution, without conflicting with it one iota, and yet making it applicable to the changes in succeeding years, in such a manner that the greatest good was done for the greatest number.

Richard F. Kenefick

Cases are to be found herein justifying the following statements; only those conclusions being placed here which it is believed are law at the present time.

1. The power of congress over subjects national in

character, ~~the power of congress~~ is exclusive. Over local subjects, the power of taxation is concurrent in state and nation.

2. Taxes although laid upon a subject local in nature, may amount to a regulation of commerce.

3. Where the power is exclusive the inaction of congress, indicates its will that inter-state commerce shall be unrestrained.

4. Commerce may be controlled to a large extent by the operation of police laws; as pilotage health and quarantine laws.

5. While a police regulation in itself might be valid, its unreasonable operation, (that is more than is necessary to effect the object of the law) renders it unconstitutional.

6. A tax affecting commerce may be valid, but one regulating it is not. Tax affecting commerce or one of the means of commerce to such an extent as to regulate it, is void.

7. If the tax affects commerce slightly, indirectly, or remotely, it may be valid although not an exercise of the police power.

8. No tax unjustly discriminating between the people of the different states, is constitutional.

9. A tax on the importer will not be sustained if it amounts to a tax on the importation.

10. Property within the jurisdiction of a state, may be taxed, although a subject of inter-state commerce.

11. And although under the control of, and owned by the United States.

12. Power to tax such property commences and prohibition to tax ceases when the property has mingled with the general mass of property in the State; that is, has obtained a situs there.

13. Property owned by a corporation engaged in inter-state commerce, may be taxed, the amount of the tax being determined by a tax on the capital stock.

14. Tax may be levied directly on the capital stock(?).

15. Tax on the franchise of an inter-state corporation, valid.

16. Direct tax on the gross receipts, invalid, but-

17. Tax on the franchise, good, when estimated by a tax on gross receipts.

18. Foreign corporations may be taxed by the state in any manner and to any extent.

19. Many cases show that the effect of a tax is to be considered, rather than the statement of the state legislature that it is imposed on a certain thing. But the Maine case makes the intent of the legislature as shown by the subject on which the tax is declared to be levied, the present criterion for determining the validity or invalidity of a tax upon corporations engaged in interstate commerce.

R. F. K.

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